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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 710 PENSION FUND, ET AL.,
Petitioners,

v.

WILLIAM R. JANOWSKI, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

I. THE JUDGMENT BELOW SHOULD BE SUMMARILY REVERSED ON THE AUTHORITY OF *BLUM* v. *YARETSKY*.

Plaintiffs-respondents studiously avoid discussion of *Blum v. Yaretsky*, —— U.S. ——, 50 L.W. 4958 (June 25, 1982) ("*Yaretsky*") and the other Article III decisions of this Court which establish that their challenge to the part-time service credit provision of petitioners' plan is not justiciable (Pet. 9-12).[1] They simply ignore

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[1] "Pet." will refer to Petition for Certiorari; "App." will refer to the Appendix to the Petition; and "Br. Opp." will refer to the Respondents' Brief in Opposition to the Petition.

the ripeness requirement (Pet. 11-12). As to standing, they advance new theories which were not adopted by either court below and which, as we briefly show, are entirely baseless.

In rephrasing the first Question Presented and in their argument (Br. Opp. i, 5-7) plaintiffs characterize this as an action to enforce the trustees' "fiduciary" obligations. While the complaint did allege a breach of fiduciary duty, none was found by either court below.[2] Plaintiffs' hypothesis that the plan's part-time service credit accrual formula (which I.R.S. had approved, Pet. 3), jeopardized the plan's tax-qualified status (Br. Opp. 7) is also unsupported by anything in the decision below. It thus impermissibly "take[s] us into the areas of speculation and conjecture" (*Yaretsky*, 50 L.W. at 4861, quoting *O'Shea v. Littleton*, 414 U.S. 488, 497, see Pet. 10). Finally, the fact that this formula "has applied every year that plaintiffs have been participants" (Br. Opp. 7) is irrelevant. Their resort to this circumlocution only confirms that even now they cannot assert that either "personally has suffered some actual or threatened injury" as a result of the part-time service credit formula, as Article III requires (*Yaretsky*, 50 L.W. at 4861, quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, see Pet. 9.)

While plaintiffs' belated theories of standing were not those of either court below, they share one important

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[2] It is, of course, uncontroverted that the trustees of the plan are fiduciaries. "But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? * * *" (*SEC v. Chenery Corp.*, 318 U.S. 80, 85-86). Here the trustees owe a fiduciary duty to all participants to perform duties set forth in § 404 of ERISA, which do not include adherence to the vesting and accrual rules set forth in other ERISA provisions. And even if trustees also owed to participants a fiduciary duty not to injure them in violation of those statutory rules, this would not aid the present plaintiffs who were not injured by the part-time service credit formula.

characteristic with the Court of Appeals' interpretation of § 502(a)(1) and the District Court's interpretation of § 502(a)(3) (see Pet. 12-13 and n.11): Each would entitle *every* participant in a pension plan to challenge the legality of *every* provision of that plan. Plaintiffs neither dispute that this would seriously burden the federal courts, nor that the statutory issue is therefore important (Pet. 13-14). Moreover, plaintiffs miss the principal thrust of Point I of our petition when they argue that "[s]tanding to bring suit based upon rights created by statute is clearly recognized" (Br. Opp. 6, citing cases). We readily acknowledged this at Pet. 13, but stressed "Article III's requirement [that] the plaintiff still must allege a distinct and palpable injury to himself * * *" (*id.*, *quoting Warth v. Seldin*, 422 U.S. 490, 501).

Because plaintiffs have failed to satisfy either the standing or ripeness requirements of Article III and the Court of Appeals did not even consider the *constitutional* standards of justiciability, certiorari is clearly warranted. Indeed, we submit that the authority of *Yaretsky*, which issued after the Court of Appeals' decision herein, is so compelling that the judgment below should be summarily reversed.

II. THE ISSUES CONCERNING THE ATTORNEYS' FEES AWARD ALSO MERIT REVIEW.

Plaintiffs also recast the Questions Presented with respect to the attorneys' fee award. They treat the issue as if it were whether the District Court abused its discretion in determining that an award of attorneys' fees is appropriate (Br. Opp. i, 8-9). But plaintiffs ultimately acknowledge that "defendants contest only the *amount* of the fee award" (Br. Opp. 9, emphasis added). The function of plaintiffs' diversionary tactic is to lay a basis for differentiating this case from the two cases in which this Court has already agreed to consider whether, in calculating the attorneys' fees to be awarded a plain-

tiff, the court may include time spent by his attorneys in litigating a claim on which the defendant, rather than the plaintiff prevailed: *Hensley v. Eckerhart*, No. 81-1244 and *Ashcroft v. Planned Parenthood Association of Kansas City, Co., Inc.* No. 81-1623 (see Pet. 14-15). Plaintiffs observe that 42 U.S.C. § 1988 (under which *Hensley* and *Ashcroft* arise), and § 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(k) (under which some of the other cases cited at Pet. 14-15 arose), provide that fees may be awarded to the "prevailing party", whereas § 502(g) of ERISA does not refer to the "prevailing party" (Br. Opp. 9). But if this difference in language has any significance at all (and we think it does not)[3] it pertains only to the issue injected by plaintiffs, and not to any which is presented by the Petition.

With respect to the *amount* of the award, the language of each of these statutory provisions is identical—all refer to "a reasonable attorney's fee". Plaintiffs advance no reason—let alone one of principle—why the award in this case may stand if this Court determines in the presently pending cases that in calculating the fee award an apportionment must be made between time spent on successful claims and time spent on unsuccessful claims. In statutory terms it is no more "reasonable" (and it is no more logical or fair) to require an ERISA defendant to pay for the time spent by his adversary in litigating a claim on which the defendant has prevailed than it is to impose such a burden on the defendant in a civil rights

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[3] While the issue is not presented, we cannot silently acquiesce in the suggestion that § 502(g) authorizes the award of attorney's fees and costs to the *losing* party. Such a radical departure from the accepted practice under both the American rule (which requires each party to pay its own fees) and those statutes which authorize the award of fees to *successful* parties, ought not to be attributed to Congress in the absence of compelling evidence that this was intended. There is no such evidence and neither the cases cited at Br. Opp. 9, nor any others that we have seen suggest that the trial courts have discretion to award attorneys' fees *against* a party which wins the entire case.

case. Accordingly, the attorneys' fee award must be reversed if the apportionment issue is decided in favor of the defendants in *Hensley* or *Ashcroft* (see Pet. i, Question 2. a)).

Moreover, it is doubly difficult to justify awarding the plaintiff *twice* the hourly rate for time spent in litigating unsuccessful claims (see Pet. 21). We note that in *Northcross v. Board of Ed., Memphis City Schools*, 611 F.2d 624, one of the minority of appellate decisions which do not require apportionment (Pet. 15, n.13) the Sixth Circuit held that a multiplier is improper (611 F.2d at 138), following that Court's *Kalamazoo Board of Ed.* decision (Pet. 21). Plaintiffs choose to ignore the conflict in the circuits on this recurring issue in fee calculation.

In attempting to justify the $142,485 award plaintiffs assert that their success on the part-time service credit formula is worth "several millions of dollars" (Br. Opp. 11), and even rely on their efforts in connection with two issues on which the Court of Appeals, reversing the District Court, denied plaintiffs all relief (Compare Br. Opp. 11 with App. 14a-15a). While we consider plaintiffs' evaluation of their own services to be grossly exaggerated,[4] the essential point for present purposes is that it is unsupported by findings. Thus, neither court below justified the award on the basis that plaintiffs conferred the benefits which they now claim. Plaintiffs' new "benefits" theory therefore unwittingly reinforces our submission that the majority of the Court of Appeals departed from the proper course of adjudication when it "adopt[ed] the district court's analysis and conclusion with respect to the amount awarded" (App. 18a), although it had

[4] The courts below required an increase in benefit accruals only for participants who work between 21 and 34 weeks in a year (App. 13a). Thus their ruling does not at all benefit the vast majority of plan participants (including plaintiffs) who work full time, nor casual or other employees who work up to 20 weeks.

reversed the district court with respect to three of four claims, including the "implied accrual" on which the District Court relied most heavily in determining that amount. (See Pet. 18-21, and App. 20a (Fairchild, J., dissenting).)

CONCLUSION

For the reasons stated in the Petition and herein the Writ of Certiorari should be granted. As explained in Point I hereof, we submit that summary reversal on the justiciability question is appropriate.

Respectfully submitted,

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